JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

Tan Hock Beng v Perfect Kamhung Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANY WINDING UP NO D8–28–446 OF 2005
KANG HWEE GEE J
26 FEBRUARY 2009

Companies and Corporation — Directors — Breach of fiduciary duties — Petitioner paid secret commission to third party from companies fund — Whether records of such payments kept — Whether petitioner had misappropriated company funds — Whether petitioner wrongly removed from board of director

Companies and Corporation — Winding up — Just and equitable grounds — Companies Act 1965 s 218(1)(i)

The petitioner complained that he had been dismissed from the board of directors ('BOD') on the ground that he as the managing director of the Perfect Kamhung Sdn Bhd and Perfect Plumbing & Construction Sdn Bhd ('the two companies') had misappropriated company funds in respect of two cash cheques, respectively for the sum of RM69,847.20 and RM20,000 issued by Perfect Kamhung Sdn Bhd. The petitioner submitted that both the cheques were received by him for the purpose of paying secret commission (described as off books funds) to one CC Foo, an engineer, who had dealt with the two companies. The petitioner submitted that due to the secret nature of the off the books funds, no records had been kept of payment made by the petitioner. The two companies are quasi partnership companies and as such if the petitioner was able to prove that he had been wrongly removed from the BOD then the two companies should be wound up. Hence this application by the petitioner against the two companies in two separate petitions sought to wind up the companies under s 218(1)(i) of the Companies Act 1965 on the just and equitable ground.

Held, dismissing both petitions with costs:

(1) It was acceptable that there was the probability that the sum of RM20,000 may have been used to pay the engineer, CC Foo, in accordance to the respondent's submission that showed that such payment had been made. However, the petitioner was unable to satisfactorily account for the RM69,847.20 which the petitioner

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

admitted had been kept in his account. The petitioner did not offer any reason why he did not after the death of the CC Foo return the money to the company which was damning to his explanation that he did not pocket RM69,847.20. The petitioner failed to show precisely how much had been paid to CC Foo as secret commissions and how much had been taken from the companies for the purpose. Hence, the petitioner would not be able to justify his claim that the secret commissions had been paid to CC Foo (see paras 15 & 17).

(2) The petitioner's conduct in banking RM69,847.20 into his own private account was inconsistent with his claimed innocence. As a director in a quasi partnership, the petitioner, takes on a fiduciary relationship inter se with the other directors to act with utmost good faith in the management of the company. However, the conduct of the petitioner in the context of quasi partnership was under the circumstances unacceptable. The petitioner had failed to maintain at least some form of records of such secret payments that he made from time to time which were drawn from the account of the company (see paras 18–19).

(3) The respondents acting through their directors were perfectly justified to convene the extraordinary general meeting ('EGM') to remove the petitioner. It was sufficient that the board of meeting preceding the EGM was to satisfy itself of the culpability of the petitioner with some evidence of probative value after hearing the petitioner (see para 20).

[Bahasa Malaysia summary

Pempetisyen mengadu bahawa dia telah disingkirkan sebagai lembaga pengarah ('LP') atas dasar bahawa dia sebagai pengarah urusan Perfect Kamhung Sdn Bhd dan Perfect Plumbing & Construction Sdn Bhd ('kedua-dua syarikat') telah menggelapkan dana syarikat berkenaan dua cek tunai, bagi jumlah RM69,847.20 dan RM20,000 yang dikeluarkan oleh Perfect Kamhung Sdn Bhd. Pempetisyen menyatakan bahawa kedua-dua cek tersebut diterima bagi tujuan membayar komisyen rahsia (diperihalkan sebagai dana tidak rasmi) kepada CC Foo, seorang jurutera, yang berurusan dengan kedua-dua syarikat. Pempetisyen menyatakan bahawa oleh sebab dana buku tersebut bersifat kerahsiaan, tiada rekod disimpan tentang bayaran yang dibuat oleh pempetisyen. Kedua-dua syarikat merupakan kuasi-perkongsian dan sekiranya pempetisyen dapat membuktikan bahawa dia telah disingkirkan secara salah daripada LP maka kedua-dua syarikat tersebut perlu digulungkan. Maka, permohonan ini oleh pempetisyen terhadap kedua-dua syarikat dalam dua petisyen yang berlainan untuk menggulungkan syarikat-syarikat tersebut di bawah s 218(1)(i) Akta Syarikat 1965 atas dasar adil dan saksama.

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

Diputuskan, menolak kedua-dua petisyen dengan kos:

(1) Adalah diakui bahawa terdapat kemungkinan jumlah RM20,000 digunakan untuk membayar jurutera, CC Foo, menurut hujahan responden yang menunjukkan bahawa bayaran tersebut telahpun dibuat. Walau bagaimanapun, pempetisyen tidak dapat memberi jawapan yang memuaskan mengenai RM69,847.20 yang mana pempetisyen mengaku menyimpan dalam akaunnya. Pempetisyen tidak memberikan sebarang sebab kenapa selepas kematian CC Foo dia tidak memulangkan wang tersebut kepada syarikat yang meminta penjelasannya bahawa dia tidak menggelapkan sebanyak RM69,847.20. Pempetisyen gagal untuk menunjukkan dengan tepat berapa banyak yang telah dibayar kepada CC Foo sebagai komisyen rahsia dan berapa banyak yang telah diambil daripada syarikat untuk tujuan tersebut. Oleh itu, pempetisyen tidak dapat menjustifikasikan tuntutannya bahawa komisyen rahsia tersebut telah dibayar kepada CC Foo (lihat perenggan 15 & 17).

(2) Tindakan pempetisyen memasukkan RM69,847.20 ke dalam akaun peribadinya tidak konsisten dengan pernyataan ketakbersalahannya. Sebagai pengarah dalam kuasi-perkongsian, pempetisyen, mempunyai hubungan fidusiari dengan pengarah-pengarah lain untuk bertindak dengan suci hati dalam menguruskan syarikat tersebut. Walau bagaimanapun, tindakan pempetisyen dalam konteks kuasi-perkongsian dalam keadaan tersebut tidak dapat diterima. Pempetisyen telah gagal untuk menyenggara sekurang-kurangnya sebarang rekod bayaran rahsia yang telah dibuat dari masa ke semasa yang telah dikeluarkan daripada akaun syarikat (lihat perenggan 18–19).

(3) Responden, melalui pengarah mereka, bertindak sewajarnya apabila mengadakan mesyuarat agung luar biasa ('MAL') untuk menyingkirkan pempetisyen. Adalah memadai bahawa mesyuarat lembaga sebelum MAL dijalankan untuk memastikan kebersalahan pempetisyen dengan keterangan yang mempunyai nilai probatif setelah mendengar penjelasan pempetisyen (lihat perenggan 20).]

Notes

For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 197–203.

For cases on just and equitable grounds, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1166–1171.

Cases referred to

Dato Ting Check Sii v Datuk Hj Mohamad Tufail bin Mahmud & Anor [2007] 7 MLJ 618, HC (refd)

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360, HL (refd)
FAI Insurances Ltd v Pioneer Concrete Services Ltd (1987) 15 NSWLR 552 (refd)
Moody v Cox and Hatt [1917] 2 Ch 71, CA (refd)
Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)
Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee [1997] 2 MLJ 190; [1997] 2 CLJ 812, CA (refd)

Legislation referred to
Companies Act 1965 s 218(1)(i)

Michael Chow (Vicknaraj with him) (Vicknaraj, RD Ratnam, Rajesh Kumar & Associates) for the petitioner.
Gideon Tan (Vincent Tan with him) (Gideon Tan Razali Zaini) for the respondent.

Kang Hwee Gee J:

[1] This is an application by the petitioner against two companies in the two separate petitions seeking to wind up the companies under s 218(1)(i) of the Companies Act 1965 on the just and equitable ground.

[2] The parties are agreed before the late Abdul Wahab bin Said Ahmad J that the two petitions be heard together.

[3] The petitioner owns one third of the total shareholding (out of 500,000 shares) in Perfect Plumbing & Construction Sdn Bhd (PPC). The other shareholders in PPC are Goh and Loo. Goh holds one third of total shareholding in PPC and Loo holds the other one third. The shareholders in PK (Perfect Kamhung Sdn Bhd) are PPC holding 249,999 shares and Tan Eng Nam holding 250,000 shares. The petitioner holds the remaining one share.

[4] The directors in PPC were at all material times the petitioner, Goh and Loo. They were all paid directors fees as well as salaries as they run the business of the company themselves. Their spouses were also paid salaries of equal amount among them although they did not formally work in the company.

[5] The directors in PK were at all material times the petitioner and Tan Eng Nam until 16 December 2003 when Goh and Loo were also made directors. They also drew monthly salaries from PK as well as directors fees.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

[6] The petitioner was removed as director of PPC and PK on 18 May 2005. That removal was challenged by the petitioner but the High Court subsequently restored him back status quo on his application complaining that the meeting convened to remove him had been irregularly conducted. Subsequently the PPC and PK convened another meeting on 5 September 2005 on the same agenda and the petitioner was by sheer force of votes removed as director of both companies.

THE COMPLAINTS

[7] The removal of the petitioner as director was based on the charge that he had misappropriated company funds in respect of two cash cheques (respectively for the sum of RM69,847.20 and RM20,000) issued on 7 June 2002 by PK.

[8] After the petitions were filed the respondents raised new allegations that the petitioner had received kickbacks from a subcontractor hired by PK for a project.

Mr Michael Chow for the petitioner

(1) Both the companies set up by the parties are in the nature of quasi partnership in the mould of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360. This is clear if one examines the origin and operation of the two companies. In the case of PPC it was incorporated in 1993 to take over an existing partnership business of Perfect Plumbing & Construction which had been set up by three partners, that is to say, the petitioner, Goh and Loo (see para 6 of encl 18 — respondent's own affidavit.) After the incorporation of PPC the parties decided to set up another company to undertake external plumbing work as PPC was only doing internal plumbing work. Another person Tan Eng Nam had wanted to join the company but because PPC was at that time an ongoing concern it was decided that a new company be set up for this purpose and that is how PK was incorporated. After PK was incorporated, the running of the two companies which have now included a new member Tan Eng Nam, continued cordially as usual. Goh and Loo were only made directors of PK in December 2003 although they were signatories of PK's banking account even before they were made directors. Both the companies shared the same staff and office premises and had common directors except Tan Eng Nam who was not a director of PPC. Both companies were meant to support each other — one carrying out internal plumbing and the other carrying out external plumbing (see para 10 of encl 18 and also para 10 of encl 1). All the members were working partners involved in the management of both companies and their spouses were drawing salaries from the

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

companies although they were not working in the companies. Each of them was provided with motor vehicles paid for by the companies. The same persons then went on to set up other companies and businesses on the same business model.

(2) It is to be noted that the monthly salary that they draw from the companies is proportionate to be a shareholding in the companies as well with their spouses drawing a flat salary. These are all evidence of quasi partnership.

(3) The charge in the EGM against the petitioner at the EGM was that he had pocketed for himself to two cash cheques from PK. The petitioner does not deny that he had pocketed the two sums. However the petitioner's case is that this has been done with the consent and knowledge of all the directors following a scheme practiced by the company to create off books funds. This is detailed in para 8 of the affidavit in encl 24. The charge was a culmination of a series of allegations which had been leveled against the petitioner. See paras 37 and 38 of the petition wherein the petitioner alleges that at a previous meeting with the petitioner and all the other partners on 4 April 2005 Tan Eng Nam, Goh and Loo had alleged that they had discovered certain discrepancy in the amount of fees and commissions paid to certain third party by PK in relation to two projects undertaken by PK. This relates to off books funds received by the petitioner making payments to third party on behalf of PK. The petitioner was taken by surprise over the allegations of impropriety on his part and he requested that he be allowed to check the company's records in order to verify whether there was such an impropriety as the events complained of took place two years ago. He was given a list subsequently which was prepared by persons in the company who were answerable to the other directors and who continued to be employed by the company. The list shows payments made to third party using the off books funds. See para 13 of encl 24. In cross-examination of Tan Eng Nam with respect to the list in exhs P24 and P25 of encl 24 Tan agreed that he received the list and even made some changes to the list thereby showing that he knew of the payments from the off books funds although in his affidavit he had said he had no knowledge of the existence of off books funds at all. See para 3.5 of his affidavit in reply encl 29 disavowing any knowledge or responsibility on the payment to engineers out of slush or off books funds. This is repeated in para 6 of his affidavit — blaming the petitioner as he did not know of the existence of off books funds practiced. See P24 and P25 of encl 24. Exhibit P24 — Ladang Lenggeng project payment made to one CC Foo showing table listing out payments made to CC Foo prepared by Josephine Lim who is the sister-in-law of Tan Eng Nam. Exhibit P25 — a list of payments made to YY Chong is shown. Again this list was prepared by the sister-in-law

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

of Tan Eng Nam. All these show that the denial by Tan Eng Nam of knowledge of off books system is not sustainable. In fact in encl 25 Tan Eng Nam himself wrote the name CC Foo then crossed it out and wrote again YY Chong. He confirmed this in his cross-examination at p 20 of the notes of evidence taken on 6 February 2006. All these show existence of the system of drawing money from the company to pay commission to engineers to induce them to award contracts to the company — housing development project. See encl 38 — exh P31 which is the transcript of the telephone conversation that took place on the 17 October 2005 between the petitioner and YY Chong. The original tape of the recording has also been tendered as exh A and verified by the maker the petitioner. On 27 December 2005 YY Chong attended as a witness and he produced the tape and confirmed the conversation. In the tape Tan Eng Nam had asked YY Chong to describe the commission payment received by him as a loan rather than commission. The transcript of the telephone conversation including the evidence given by YY Chong clearly points to direct knowledge on the part of Tan Eng Nam on the commission system or off books funds. It also shows that Tan Eng Nam was very much involved in giving effect to the payment of commission and had gone so far as to procure YY Chong to describe the payment of commission as a loan rather than commission if he should be asked. In encl 24 para 8 the petitioner had given a very detailed account of how off books funds were created for the Ladang Lenggeng project for the purpose of payment of commission to the engineer in charge of that project one CC Foo. The creation of the off books funds in that case involved one subcontractor by the name of Bakat Raya whereby the parties engineered the creation of a sum of RM350,000 of off books funds to pay commission to CC Foo. This was achieved through progress claim submitted by Bakat Raya to PK for purported works carried out by Bakat Raya. The two payments which formed the charge leveled against the petitioner are related to this particular exercise. It has been explained in para 18 of the affidavit in encl 24. The evidence detailed in this affidavit together with the evidence of the cross-examination of one Christine Yong Yuet Hong on 6 February 2006 would show that the purpose of the two payments was clearly known to the other directors of PK. It also shows that the payment had been prepared not at the instance of the petitioner but by one Miss Yew who was the accounts person for PK and who answered to Tan Eng Nam in her job. The evidence showed that Tan Eng Nam and Goh who both signed the cheques in question were aware of the purpose of the payment. The two tables were prepared at the instance of Tan Eng Nam by Yong Yuet Hong, an accounts clerk in PK for the purpose of allowing the petitioner and any other directors to know the

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

total payments made to YY Chong and CC Foo and she confirmed that this was given to the petitioner and the other directors. (exhs P24 and P25 of encl 24.)

(4) Previous to the EGM at the Board Meeting held on 30 April 2005 petitioner was confronted with the allegation and charge for the first time as to certain payment vouchers in particular two payments made to a company by the name of Kejuruteraan Lin Hup Sdn Bhd the notice of which was given earlier before the board meeting for 30 April 2005. There was clearly an element of bad faith as they had already put in motion the steps to remove the petitioner as director even before this purported allegation was put to him at the board meeting on 30 April 2005. They had made up their mind to remove him even before the board meeting by a notice of the EGM to be convened for the purpose of removing him.

(5) It is not disputed that the petitioner did cash the two cheques but there is a valid reason which was known to the accusing party as a matter of course as an accepted conduct by all the shareholders and directors of the company. The encashment of these two cheques involved cashing the two cheques to create off books funds in order to make payment of commission to secure contracts for the company. This is explained in the petition at paras 7b and 8 of the affidavit verifying petition in encl 24. The cashing of the two cheques is nothing extraordinary as it was a practice of the company at that time to create off books funds for the purpose of paying commission as well as to pay the directors themselves thereby saving them from being taxed as income.

(6) Although the act of creating the off books funds may be unlawful or immoral as it may have contravened revenue laws, it does not prevent the petitioner from seeking equitable relief from this court relating to his removal. The relief sought here is not to advance the alleged conduct which contravenes public policy but is related to the removal of the petitioner from the company by the other partners.

(7) Evidence of slush funds — see paras 7b and 8 and also paras 16 and 17 of the supporting/verifying affidavit encl 24 — creation and purpose of slush funds and other directors were well aware of this system. The very detailed explanation by the petitioner was met by a bare denial in the opposing affidavit. As against the bare denial there are clear and contemporaneous documents which support the contention of the existence of this slush fund and payment made therefrom.

(8) The two cheques in question were prepared by a Christine Yong an accounts clerk and signed by Tan Eng Nam and one Mr Goh and made payable in cash. Miss Yong was instructed to prepare both the cheques not by the petitioner but by a Miss Yu who is the person in charge of

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

accounts for the company PK and who at all material times an employee in the company answering to Mr Tan Eng Nam. During the course of the proceedings Miss Yu remained in the employment of PK and despite the references to her involvement in the preparation of the two cheques she was never called as a witness nor did she sign any affidavit to refute her involvement in the preparation of the two cheques. Reference is also made to para 12 of encl 20 which sets out Miss Yong's account of what happened from the time the vouchers were prepared until the cheques in question were signed by the other two directors. The petitioner only approved the vouchers for the two cheques but the cheques were signed by the other two directors after enquiring from the petitioner as to their purposes. Cross-examination of Miss Yong on 25 May 2006 at p 3 confirmed that she and Miss Yu handled the account and that the petitioner was not the one who instructed her to prepare the vouchers for the cheques and the cheques but Miss Yu who was answerable to Tan Eng Nam, one of the other directors.

(9) Tan Eng Nam the mandatory signatory of the two cheques denied knowing the purpose for which the cheques were issued and had pre-signed cheques and left them to Miss Yong. However the denial was not tenable for the following reasons — firstly in his cross-examination Mr Tan Eng Nam had admitted that his inclusion as the mandatory signatory to the cheques of the company was at his insistence in order to allow him to 'know where the monies go to or spend for'. Secondly, he still does not explain the fact that the second signatory to the cheques was not the petitioner but by Mr Goh who is the other director. Mr Goh did not affirm any affidavit on this issue. In fact Mr Goh only affirmed affidavits in the other proceeding in D8–28–447 of 2005.

(10) See *Moody v Cox and Hatt* [1917] 2 Ch 71. The doctrine that a party who seeks equity must come with clean hands only applies to situations where the alleged wrongdoing by such a party has a direct relation to the equity sought in the case. Here the evidence given by the petitioner is that with the knowledge and consent of the other directors and shareholders the off books funds were created. The petitioner is not in this petition seeking to enforce any right in relation to these off books funds. What the petitioner is seeking is in fact a determination by this court that his exclusion and removal from the respondents' company was wrongful and in breach of the understanding between the parties. In *Moody v Cox* the plaintiff came to court seeking rescission of an agreement. It was in evidence that in procuring that agreement the plaintiff had paid a bribe to secure the agreement. The defendants in the action in resisting the claim for rescission had sought to argue that because the plaintiff had paid a bribe he was coming to court with unclean hands. The court held that the bribe although objectionable

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

had no direct relationship to the relief of rescission being sought and therefore the plaintiff was not disbarred from such relief. Also see *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552 at p 559:

> In *Attwood v Small* [1835–42] All ER Rep 258 at p 267; (1838) 6 Cl & Fin 232 at p 447; 7 ER 684 at p 765; Lord Brougham said:
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> ... that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to overreach were enough, I hardly know a contract, even between persons of very strict morality, that could stand.
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> Also at p 561:
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> In *Republic Molding Corporation v BW Photo Utilities* 319 F (2d) 347 (1963), the United States Court of Appeals 9th Circuit said (at p 349):
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> ... misconduct in the abstract, unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands. The concept invoking the denial of relief is not intended to serve as punishment for extraneous transgressions, but instead is based upon 'considerations that make for the advancement of right and justice'. *Keystone Driller Co v General Excavator Co* (1933) 290 US 240 at p 245.
>
> What is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant.
>
> However, the more one examines the rule in its application in the cases, the more one can see that it is only if the right being sought to be vindicated by the plaintiff in a court of equity, is one which if protected, would mean the plaintiff was taking advantage of his own wrong, that the court will either debar him from relief or perhaps say he is not a proper plaintiff in a representative suit.

(11) The allegation by the respondents is that the petitioner had allegedly utilised two cancelled invoices issued by this company called Lin Hup

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

amounting to slightly over RM80,000 to draw out cash from the company and kept it for himself and therefore committed CBT. The petitioner's side of the story is that this money went into the slush fund. The existence of this slush fund is supported by firstly the substantial payout by the petitioner to his fellow directors and related company during the period of 1999 and 2003. Over this period the petitioner made payment to the directors from this fund and this is evidenced by the production of cheques issued out to the directors.

(12) With respect to the allegation that RM89,847.20 had been misappropriated, the petitioner had accounted for it in his affidavit in encl 24 based on his own document in the form of cheque book butt. However, the complete record of payments from the slush fund for the particular project in question is with the respondents and the petitioner had not been able to gain access after his exclusion from the respondents. He had been denied access to the office where the financial records and documents are kept. This is set out in para 25 of encl 24. The fact that the respondents through their employees were able to produce a table of payments made to a particular engineer would show that the respondents contrary to the denials by Tan Eng Nam had knowledge and records of the slush fund and the payout from the fund. The cross-examination of Tan Eng Nam in relation to the Lin Hup allegation also revealed that the entire allegation had been concocted. For this, I refer to the cross-examination of Tan Eng Nam on the 5 July 2006. In brief during his cross-examination, Tan Eng Nam claimed initially that he got to know of the Lin Hup issue when Lin Hup contacted him to chase for outstanding payment which Tan Hock Beng the petitioner had allegedly not settled on behalf of the respondents. Essentially what is disclosed by the cross-examination is the bizarre account by Tan Eng Nam that after he was contacted by Lin Hup, he did not confront Tan Hock Beng the petitioner. He did not make enquiries of the amount allegedly outstanding that he went for a meeting with Lin Hup without Tan Hock Beng to discuss the account that at this meeting Lin Hup allegedly told Tan Eng Nam that the respondents owed them money but without disclosing how much and neither did Tan Eng Nam enquired as to the quantum. The cross-examination would disclose that Lin Hup allegation had been concocted by Tan Eng Nam and its other directors. Tan Eng Nam had alleged that he was alerted of the Lin Hup issue because of the letter of demand for payment by Lin Hup. But at the end of the cross-examination, he had conceded that there was no letter of demand from Lin Hup seeking payment. At the same time during cross-examination he alleged that a sales person of Lin Hup had orally informed him that payments were due to Lin Hup by the respondents which the petitioner was not settling. However such account is hearsay.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

And secondly the improbability of the demand for payment by Lin Hup without specifying the quantum and Tan Eng Nam allegedly not having enquired himself what was the amount allegedly be would further show that this allegation involving Lin Hup is but a concoction to frame the petitioner. I would invite the court to consider the unusual circumstances of the letter being written by a supplier not asking for payment but to confirm that certain invoices had been cancelled previously and payment had not been received by Lin Hup. We must also not lose sight of the fact that the two cheques issued by the company in payment of the two Lin Hup invoices were signed not by the petitioner but by Tan Eng Nam together with another director Mr Goh. The petitioner is being accused of CBT in relation to the RM89,000 to the Lin Hup invoices. The Lin Hup transactions took place in 2002. It is in evidenced that in 2002 itself the petitioner issued out payments amounting to RM300,000 from his own personal account in favour of the other directors and another company in which all of them have an interest. We would invite the court to consider also the improbability of the element of dishonesty on the part of the petitioner in respect of the RM89,000 when at the same time he is also issuing substantial sum far in excess of this sum.

(13) Generally, I would say that Tan Eng Nam is an unreliable and evasive witness. In the documents which carry his handwriting one can see that he can write well in the English language. However, in cross-examination when invited to write his name in court he produced a childish, gibberish handwriting. This can be seen from exh B. On the one hand while in his own affidavit he has given evidence to the genesis of Perfect Plumbing in cross-examination he feigned ignorance of the names of the directors of Perfect Plumbing. Furthermore when asked about the business of the respondent he claimed to have carried out the affairs of the company in the past two years without knowing whether it was making a profit or a loss.

(14) The petitioner's contention from beginning to end is that he has been framed by fellow directors and shareholders who had fallen out with him. There is an affidavit affirmed by the wife of the petitioner giving an account of the meeting she had with Tan Eng Nam and the other directors after the petitioner's exclusion from the company. In this meeting the petitioner's wife has given an account of the blackmail perpetrated by Tan Eng Nam whereby in brief he had told the petitioner's wife that he would be in a position to cause the withdrawal of the police report against the petitioner if the petitioner agreed to pay RM2m and relinquish all interests in the company. The affidavit is in encl 20. The wife was offered for cross-examination but this was declined. Furthermore the affidavit of the wife was met by a general denial by Tan Eng Nam. Secondly, the examination of the police report

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

lodged by Tan Eng Nam against the petitioner in relation to the Lin Hup payment revealed a contradiction with what has been asserted in this proceeding for example it is alleged in the police report that the cheques were allegedly prepared by the petitioner when this is clearly not the case. The police report is to be found as part of exh 'R-31' of encl 18 which is the Tan Eng Nam's affidavit. In fact the police report also revealed a contradiction of how Tan Eng Nam allegedly came to be aware of the Lin Hup payments.

(15) In cross-examination Tan Eng Nam has also admitted that the respondents are insolvent and not carrying out business. I raise this point because there are cases to suggest where a company is a going concern the court may be reluctant to make a winding up order in the context of a breakdown of relationship amongst quasi partners.

(16) A lot of the evidence that has been leveled against the petitioner is based on hearsay and also after thought. The hearsay rule is particularly applicable in the winding up petition in suit 447 where the deponent merely repeated and adopted the assertion made by Tan Eng Nam in winding up petition 446. What is clear is that notwithstanding any absence of admissible evidence in petition 447 to contradict and answer the petition the allegations in relation to events which allegedly took place in Perfect Kamhung which is the respondent in petition 446 are being used against the petitioner in Perfect Plumbing which is the respondent in petition 447. There is otherwise no allegation of any misconduct on the part of the petitioner in Perfect Plumbing yet he was removed simultaneously with his removal from Perfect Kamhung.

Encik Gideon Tan for the respondents

(1) The position I am taking is premised simply that the petitioner who petitioned the court on just and equitable ground under s 218(1)(i) must come with clean hands. It is clear that the petitioner's complaint in essence is his removal as a director from the two companies Perfect Kamhung and Perfect Plumbing. It is not in dispute that the reason for his removal was the allegation that he has stolen RM89,847.20. See the cross-examination of the petitioner on 27 December 2005 from pp 15 and 16 where the petitioner had admitted encashing one cheque and banked in another in respect of RM20,000 and RM69,847.20 therefore totaling RM89,847.20. He has also admitted in respect of these two sums there was no reason for the payment vouchers to be prepared for the payments to be made. Further he also admitted receiving these two sums from Perfect Kamhung. Also confirmed police report lodged by another director Tan Eng Nam in respect of the theft of RM89,847.20. See his explanation on p 16 of the notes of evidence — 'The RM89,847.20 was received by me for the purpose of paying

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

commission to a third party one CC Foo as engineer for the Ladang Lenggeng project, encashed and paid RM20,000 to CC Foo for the top up whereas the RM69,847.20 was banked into my current account as payment to CC Foo not due yet'. Also confirmed balance was still in his account. In respect of the RM20,000 the explanation given was that it was paid to CC Foo and no record. In respect of RM69,847.20 the petitioner says that it is still in his bank account and it was supposed to be payment to CC Foo — cannot confirmed.

(2) We exhibited petitioner's own affidavit in suit D3–22–1615 of 2005 wherein he was defending a Mareva Injunction and giving disclosure of his bank account where the four bank accounts he disclosed as at 29 November 2005 only contained the following amounts — Hong Leong Bank RM2229.59; HSBC RM3,425.70; Affin Bank Berhad RM5913.42 and RHB Bank Bhd RM1. The evidence he gave was on 27 December 2005 before the late Justice Abdul Wahab bin Said Ahmad that the petitioner said that 'the balance is still in my account. Yes it was meant for paying CC Foo'. The evidence clearly shows that he had misappropriated the monies belonging to the company. His evidence and explanation clearly show that these monies belonged to Perfect Kamhung even if we are to accept his explanation, the RM69,847.20 was clearly banked into his own account and as at giving evidence on 27 December 2005 he has already spent and used the money. That in essence is CBT. There is good reason therefore for his removal as a director in both the companies. I accept that both the companies are quasi partnership but given the conduct of the petitioner there is ample reason for the other partners Mr Tan Eng Nam and Mr Goh Lai Hee to remove him the petitioner from the board of directors.

(3) The fact that the cheques of RM20,000 and RM69,847.20 were signed by the other two partners does not necessarily mean they condoned the payments. It should be noted the cheques were signed in 2002 where the relationship between the partners was based on trust and confidence. Furthermore it has always been the respondents' position that the two partners were spending their time outside the office on site attending to the projects leaving the management of the business and office administration to the petitioner. In fact the petitioner under cross-examination considered himself as the managing director of the company. As a matter of practice, Mr Tan Eng Nam and Mr Goh being the partners working on site outside the office would pre-sign cheques for the disposal of the petitioner. It should also be noted that the payment vouchers were prepared in 2002. There is no reason for Mr Tan Eng Nam or Mr Goh to question its veracity at the point in time.

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

(4) The exhibit relied upon exh 'P-24' of encl 24 to show there were payments made to an engineer one CC Foo — these payments in exh 'P-24' are properly documented supported by vouchers and known to the directors. The two payments in question that is RM20,000 and RM69,847.20 were made on payment vouchers which on its face are payments to the supplier Kejuruteraan Lin Hup and for specific invoices which had been cancelled at a point in time the payment vouchers and cheques were issued. This clearly shows that the other directors at the material time were unaware of these payments made. Second why was there a necessity to issue two cheques on the same day for the 7 June 2002 if the explanation given by the petitioner is to be accepted. The petitioner had said under cross-examination 'the RM20,000.00 I encashed it and paid to the third party CC Foo for the top up whereas the RM69,847.20 was banked into my current account because the payment is not due yet'. It is submitted that there is no reason for the second cheque of RM69,847.20 to be drawn up if the payment is not due to Mr CC Foo on 7 June 2002. Further there is no reason for the petitioner to put the money into his own account and presumably earning interest on it.

(5) Slush fund? Figment of someone's imagination? Is there such a system? The petitioner has not shown such commission payments to any third party but even if commission has been paid it does not explain why RM89,847.20 was encashed by him and paid into his account. All that the petitioner had shown is that commission had been paid in the conduct of the respondents' business but it does not explain his taking away of RM89,847.20.

(6) See Court of Appeal case on 'clean hands' as it applied to cases under s 218(1)(i) of *Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee* [1997] 2 MLJ 190 at p 206; [1997] 2 CLJ 812 at p 828:

> As Lord Cross of Chelsea said in the *Westbourne Galleries case* [1972] 2 All ER 492 at p 507, 'A petitioner who relies on the just and equitable clause must come to court with clean hands …
>
> *Submit*: Court of Appeal applies the general principle of unclean hands and looks at the conduct of the petitioners. In the instant case, the reason for removal is clearly because the petitioner had misappropriated RM89,847.20. The evidence is clear that he has taken the money.

(7) It is not a must in every case if under the just and equitable principle that a company must be wound up. See *Dato Ting Check Sii v Datuk Hj Mohamad Tufail bin Mahmud & Anor* [2007] 7 MLJ 618 at p 635:

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

Courts are well aware that a person who incorporates companies to do business does not want to be bound by partnership principles and they seek protection under the spirit and intent of the CA 1965. In consequence courts do not ordinarily entertain sympathy evoking stories, unless the justice of the case demands the intervention of the court, taking into consideration the fact and all the circumstance of the case, to ensure transparency and corporate accountability, in the right perspective.

(iv) Before exercising the discretion under just and equitable principle, the court must be satisfied that the petitioner's complaint is bona fide and he comes to the court with clean hands and that there is no collateral purpose in presenting the petition.

Submit: Even if the petitioner had proved his case this honourable court must balance the equity between the shareholders. In balancing the equity between the shareholders the conduct of the petitioner is important. The cross-examination found on pp 17 and 18 of the notes of proceeding shows that he has a grudge for being removed as a director and notwithstanding the fact that a buy out may be more appropriate for profitable company. He insists that if he cannot be part of the company it must be wound up. Company cannot be wound up on this ground alone and for the reasons provided.

Reply by Mr Michael Chow

(1) It is incorrect that the documents produced in exhs 'P-24' and 'P-25' of encl 24 document the payment of commission to third parties. The vouchers which had been produced in fact on the face of them were dressed up as vouchers for the payment of suppliers and creditors. In fact some of these vouchers which purport to make payment to sub-contractors had been cashed out by Tan Eng Nam himself. This proves that there was in place in the company a system to create off-book funds by way of fictitious vouchers and this system was being practised not only by the petitioner but by the other directors as well. These are the same directors who in this proceeding had at the outset denied any knowledge or participation in such a system. However the evidence shows otherwise and the submission taken by my learned friend in his submission confirms that and represents a complete U-turn in the stand that has been advanced by the other directors.

(2) The submission taken by my learned friend is that the cheques for RM20,000 and RM69,847.20 had been pre-signed by the two directors whose signatures appeared on the cheques including Tan Eng Nam. As

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

far as Goh's signature is concerned it has never been the respondents' case that his signature was pre-signed. As for Tan Eng Nam's contention that he pre-signed these cheques it had been put to him that such practice of pre-signing cheques never existed within the company and is inconsistent with his rational of insisting of being included as a mandatory signatory so that he is kept informed of the expenses incurred by the company. The event surrounding the signing of the two cheques has been set out in encl 19 in the affidavit of Yong Yuet Hoong and she had maintained that the two directors who signed the cheques knew of the reason for the cheques being the payment of commission to CC Foo. The table in encl 24 which evidenced the payment of commission to CC Foo was prepared by the company and given to the petitioner. The petitioner's position had always been that the table was incomplete in that it did not reflect all the payments that were made to CC Foo. We would submit that on the balance of probability there cannot be any suggestion of impropriety or dishonesty on the part of the petitioner in relation to these two cheques. This position is further reinforced when one considers that in the year of 2002 when he is alleged to have misappropriated the proceeds of these two cheques he had made payment of almost RM500,000 from his personal account in favour of the other directors and another partnership company by the name of Trenjin Sdn Bhd in which the petitioner and the other directors including Tan Eng Nam were directors and shareholders.

(3) If there was any truth in the allegation that my client misappropriated the proceeds of the two cheques surely there would have been an earlier demand for the repayment when the alleged misappropriation was discovered. Instead what we have is the respondents' own evidence that the allegations were first put to him at the meeting of 30 April 2005 and immediately after the meeting a police report was lodged against the petitioner based on these allegations. We also need to consider the fact that my client was removed pursuant to a notice for a requisition of EGM issued on the 15 April 2005 well before the board meeting of 30 April 2005. In other words the inference would be that the allegations on the two cheques had been concocted in order to support steps already put in place to remove the petitioner as a director.

(4) This being a quasi partnership relationship and there being a breakdown in the relationship we say that a prima facie case for winding up has been made out. The cases of course have decided that if a petitioner was the cause of the breakdown in the relationship then he may not be entitled to relief. See *Ebrahimi*'s case orbiter.

(5) The clean hands doctrine is explained in the book *Corporate Powers Accountability* (2nd Ed) by Dato' Loh Siew Cheang at p 1213:

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

The clean hands doctrine in appropriate cases bars winding up on the just and equitable ground by a petitioner regardless of whether the company is an ordinary or quasi-partnership company. In *Re John While Springs (S) Pte Ltd; Re Segno Precision Pte Ltd* [2001] 2 SLR 248, a case not involving quasi-partnership principles the petitioners admitted to breaches of fiduciary duties in their capacity as directors. Choo Han Teck JC held that that was a sufficient reason to dismiss the petition.

In quasi-partnership companies concerning the breakdown in relationship where one party alleges that it is no longer possible to continue the association with the other party because mutual trust and confidence have broken down, the alleged underlying reasons might have been contributed by the petitioner's misconduct. If so, the general principle is that the petitioner will be denied the relief in the absence of 'clean hands'. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, Lord Cross said:

A petitioner who relies on the 'just and equitable' clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue. *Ibid*, at p 387.

In the instant case the reasons advanced for the removal of the petitioner had been his alleged wrongdoings in relation to the so called Lin Hup payments. However, the notice of meetings for his removal was dated 15 April 2005. The Lin Hup issue only arose subsequently on 18 April 2005. We have previously submitted that an examination of the dates will confirm that the allegation had been concocted and further that the decision to remove the petitioner had been made earlier and the Lin Hup allegation had been created to support such a decision. In fact it is not in dispute that the board meeting with the petitioner who was first called on the 4 April 2005 where it was alleged that certain discrepancies had been discovered in relation to the payment of commission to the engineers. In any case we had demonstrated on the balance of probability that there was no element of dishonesty on the part of the petitioner in relation to the Lin Hup payment. There are two important elements of the case which support our contention that there was no dishonesty. Firstly the cash cheques were not signed by my client. Secondly the evidence given which has not been seriously disputed that the reasons for the cheques were known to the other directors at the time.

(6) In so far as the notes of proceedings are concerned, these must be read in its entirety and bearing in mind the possibility of error in recording and transcribing while there is a passage in the

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

cross-examination of the petitioner where he is alleged to say that the RM69,000 was still in his account. That statement must be read against the rest of the cross-examination where it was put to him that he kept the money and he deny it and the explanation that he had given in his affidavit where among other things at para 22 he had explained that after the payment of RM69,000 he proceeded to make additional payment to CC Foo which according to his record totaled RM550,000.

DECISION

[9] The petitioner's complaint is that he had been dismissed from the board of directors on the ground that he as the managing director of the two companies had misappropriated company funds in respect of two cash cheques (respectively for the sum of RM69,847.20 and RM20,000) issued on 7 June 2002 by Perfect Kamhung.

[10] It is common ground that the two companies are quasi partnership companies in the mould of *Ebrahimi v Westbourne Galleries* [1973] AC 360. In the event that the petitioner is able to prove that he had been wrongly removed from the board of directors then the company should be wound up.

[11] To succeed the petitioner must be able to prove on the balance of probability that he had been wrongly and unfairly removed as a director of the two companies Perfect Kamhung and Perfect Plumbing, by proving that he had not misappropriated the two sums of RM69,847.20 and RM20,000 belonging to the companies the subject matter of the dismissal.

[12] Essentially his explanation with respect to the sum of RM89,847.20 (RM69,847.20 and RM20,000) was received by him for the purpose of paying secret commissions (described as off books funds by counsel for the petitioner) to CC Foo an engineer for the Ladang Lenggeng project of which the companies had dealing with. Due to the secret nature of the off books funds, no records were kept of such payments by him.

[13] With respect to the cash cheque of RM20,000, he said in his evidence that he had encashed it but had used it to pay CC Foo as commission.

[14] With respect to the cash cheque of RM69,847.20 he claimed that it was also encashed but had banked into his current account as the payment to Mr CC Foo was then not due yet. Mr CC Foo had since passed away and hence the money had remained in his account. In cross-examination this was what he said:

Q: You had some excuse? And would you like to explain to the Court.

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

A: The 89,847.20 was received by me for the purpose of paying a 3rd party to one C.C. Foo as engineer of the project. Beside the commission there is a top up quantity in the contract which the engineer purposely created the extra quantities in the original bill of quantities during the tender preparations. The 20,000 I encashed it and paid to the 3rd party C.C. Foo for the top up whereas the $69,847.20 was banked into my current account because the payment not due yet.

Q: What you are saying you gave to C.C. Foo.

A: Yes $20,000. The balance is still in my account. Yes it was meant for paying C.C. Foo.

[15] I can accept the submission of counsel for the petitioner that there is every probability that the sum of RM20,000 may have been used to pay CC Foo the engineer as the respondent's own document exh 'P-24' did show that some payments had been made. But the petitioner it is clear to me is unable to satisfactorily account for the RM69,847.20 which he admitted had been kept in his account and was at the time of cross-examination still in the bank. He did not offer any reason why he did not after the death of CC Foo return the money to the company. This is damning to his explanation that he did not pocket the RM69,847.20.

[16] I cannot accept the submission of counsel for the petitioner that this was not what the petitioner meant in his cross-examination, that there was an error of recording by the previous judge the late Abdul Wahab bin Said Ahmad J.

[17] It is true that in para 22 of his affidavit encl 24 he had said that he had made altogether a payment of RM550,000 to CC Foo the engineer. But nowhere in his affidavit did he say that this sum of RM69,847.20 was no longer in his account as he had used it to pay CC Foo. Neither could he show in his affidavit by his own statement of account that the RM550,000 that he had allegedly paid to CC Foo included the RM69,847.20. It would appear that in para 22 he was merely attempting to justify that there was no need to return the said sum of RM69,847.20 to the company as he had already made payments to CC Foo in excess of RM550,000. By not showing precisely how much had been paid to CC Foo and how much had been taken from the company for the purpose the petitioner would not be able to justify his claim that the sum had been paid to Mr Foo.

[18] The petitioner's conduct in banking the sum of RM69,847.20 into his own private account is inconsistent with his claimed innocence.

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Thu Oct 29 18:16:41 2009
/reports/caseml/case/mlj/2009_006_mlj_92

[19] The fact that such a fund (by whatever name it is called) existed for the purpose as described by the petitioner is not in doubt. But a director in a quasi partnership takes on a fiduciary relationship inter se with the other directors to act with utmost good faith in the management of the company. The conduct of the petitioner in the context of quasi partnership is under the circumstances unacceptable. He had failed to maintain at least some form of records of such secret payments that he made from time to time which were withdrawn from the account of the company. In particular he has failed to provide a valid reason why the sum of RM69,847.20 was banked into his account and not returned to the company after the death of CC Foo.

[20] The respondents acting through their directors were perfectly justified to convene the EGM to remove the petitioner. All that was required of the board at its meeting preceding the EGM was to satisfy itself of the culpability of the petitioner with 'some evidence of probative value' after hearing the petitioner. See *Administrative Law of Malaysia and Singapore* (3rd Ed) by MP Jain at p 327, as applied by the Court of Appeal in *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314.

[21] In the event I am bound to find that the removal of the petitioner from the board of the two companies was not without just cause and that this is not a proper case to wind up the companies on just and equitable ground under s 218(1)(i) of the Companies Act 1965.

[22] Both the petitions are dismissed with costs.

Petitions dismissed with costs.

Reported by Mashrifah Ravendran